IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-781

EXXON CORPORATION AND SHELL OIL COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, an independent agency of the Executive Branch of the United States; RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency; and JOHN QUARLES, Deputy Administrator of the Environmental Protection Agency, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS EXXON CORPORATION AND SHELL OIL COMPANY

FREDERICK M. ROWE
EDWARD W. WARREN
TIMOTHY S. HARDY
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D.C. 20006
202-857-5000

Attorneys for Petitioners

Of Counsel:

JESS W. VAN ERT
MALCOLM D. HAWK
JAMES A. EVANS
WILLIAM D. MAER

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I

On February 23, 1977, this Court in *E.I. duPont de Nemours and Co.* v. *Train,* No. 75-978, resolved Issue I presented by the above-captioned Petition for Certiorari. However, Issues II and III raised by petitioners remain to be resolved. The purpose of this short response is to correct statements made by Respondent, Environmental Protection Agency, in its brief filed in

February 1977 and to urge once again that this Court grant certiorari on Issues II and III in the interest of fair and effective implementation of the Federal Water Pollution Control Act Amendments of 1972 ("the Act").

II

Petitioners' Issue II asks this Court to resolve the conflict existing among the courts of appeals that have considered the validity of EPA's "variance clause" for granting exceptions to 1977 effluent limitations guidelines. In *duPont*, this Court found that the Act requires that "some allowance is made [by EPA] for variations in individual plants" under the 1977 limitations (Slip opinion at 15). Therefore, the split among the courts of appeals on the validity of EPA's variance clause poses significant difficulties for continued implementation of the Act in the thousands of individual permit applications now being processed (Pet. pp. 14-15).

In its Brief, the EPA avoids any mention of the split among the courts of appeals (Resp. Br., pp. 5-6). But, as pointed out in our Petition (pp. 12-15), the Fourth Circuit in *Appalachian Power* v. *Train,* 545 F.2d 1351 (1976), invalidated, after certiorari was granted in *duPont,* a variance clause for the steam electric power industry identical to the clause upheld by the Tenth Circuit in the present case, *API* v. *EPA,* 540 F.2d 1023, 1032-33 (1976). Contrary to the Tenth Circuit's conclusion that "[t]he interpretation and application [of the variance clause] must await action on a variance claim asserting specific facts," *API, supra,* at 1033, the Fourth Circuit found that the variance clause on its face was "unduly restrictive" because "only technical and engineering factors, exclusive of cost, may be considered in granting or denying a variance." *Appalachian Power, supra,* at 1359. Until this conflict among the courts of appeals is resolved, needless litigation and further delay in implementation of the Act's water pollution control program is inevitable (Pet. pp. 14-15).

III

Petitioners' Issue III asks this Court to resolve the important question of whether EPA can ignore the competitive effect of its regulations under the Act and impose arbitrary, capricious and discriminatory water pollution limitations on petrochemical and integrated refineries. In addressing this issue, EPA misstates the record evidence before the Tenth Circuit.

First, contrary to the Agency's statement (Resp. Br., p. 3), EPA did not take into account "actual differences between types of refineries." Indeed, EPA could not have taken such differences into account in any other than an arbitrary and capricious manner since EPA's regulations allow a refinery with complex petrochemical facilities less discharge than an identical refinery would be allowed *without* such concededly effluent-producing processes. For example, under the regulations, a 300,000 barrel/day refinery *without* any petrochemical facilities receives a greater effluent discharge allowance than a 300,000 barrel/day refinery *with* effluent-producing petrochemical facilities. The real-life impact of these discriminatory regulations was described with respect to Shell's Martinez, California, manufacturing complex in our Petition (pp. 17-18).

Second, contrary to the EPA's arguments (Resp. Br., p. 6), petitioners presented significant data to the Agency demonstrating the arbitrary and capricious effect of its regulations. Thus, petitioners' November 1974 Comment to EPA specifically addressed the Agency's failure to give any credit to petrochemical processes "which contribute substantially to raw waste loading and effluent discharge." (R. 8146-47) Indeed, it was the failure of the EPA and the Tenth Circuit to recognize this inherently illogical result which impels petitioners to seek relief from this Court.

Third, the Government argues a *non sequitur* by denying the discriminatory impact on petrochemical and integrated refineries on the ground that, due to judicial remand, there are no organic chemical industry regulations with which refinery regulations may be compared (Resp. Br., p. 6). When the new organic chemical regulations issue, they will, like chemical plant permits issued to date, grant some allowance for effluent created and discharged by organic chemical processes. These new organic chemical regulations will in no way change EPA's *independent* regulations for petrochemical and integrated refineries which actually *reduce* the effluent discharge allowance to a level below that allowed for an identical refinery without such additional effluent-creating facilities. Therefore, no matter how stringent the limitations for organic chemical plants, they will allow *more* discharge than is allowed for the *same* processes in petrochemical and integrated refineries.

Through its misstatements and omissions regarding Petitioners' Issue III, EPA obscures the significant issue of competitive disadvantage caused by its regulations. In short, EPA has issued arbitrary and capri-

cious regulations that lead to the inherently illogical and discriminating result of reducing the discharge allowable to a refinery that has additional effluent-creating petrochemical facilities. Petrochemical and integrated refiners are thus placed at an economic disadvantage *vis a vis* their direct competitors in both the refining and chemical industries. In light of established administrative law principles, neither this arbitrary and capricious result, nor the failure of EPA to consider economic competitive factors, should be allowed to stand.

CONCLUSION

The Court should promptly grant certiorari on Issues II and III so that these important issues can be resolved as expeditiously as possible.

Respectfully submitted,

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Washington, D.C. 20006
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